Professor Schwartz suggests that consumers may not save a full $1 billion per year from Bell company interLATA competition. His claims are incorrect, see Hausman Reply Aff. ¶¶ 33-42; Schmalensee Reply Aff. ¶¶ 5-34, but that is virtually beside the point. The salient and indisputable fact, accepted by all except the incumbent carriers themselves, is that consumers of interLATA services will be better off from granting this application.

B. Approving BellSouth's Application Will Promote Local Competition

Having found that the local market in Louisiana satisfies the requirements of section 271(c)(1) and the competitive checklist, that BellSouth will provide interLATA services in Louisiana in compliance with section 272, and that BellSouth's entry into the interLATA market will cause prices to fall, the Commission will have addressed the issues Congress intended it to consider. The local market has been opened, interLATA entry will be conducted as Congress desired, and consumers will be better off. The Application should be approved on this basis. See BellSouth Br. at 84-88 (discussing limits of the public interest test).

Nevertheless, numerous commenters have sought to cast this and other section 271 proceedings as a calculated trade-off between local and long distance competition. Even if local competition issues beyond checklist compliance were considered, which they should not be, no balancing would be necessary. Approving BellSouth's application will promote both local and long distance competition. As the Louisiana PSC has found, "[o]nce full long distance competition is opened up in Louisiana, the major competitive providers of local exchange service

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not have strong incentives to cut interLATA prices").

will take notice and adjust their respective business plans to move Louisiana closer to the top of their schedules, resulting in faster and broader local exchange competition for Louisiana consumers." Louisiana PSC at 20. "Lowering the barrier" to BellSouth's entry into long distance "will create real incentives for the major interexchange carriers to enter the local market in Louisiana, because they will no longer be able to pursue other opportunities secure in the knowledge that BellSouth cannot invade their market until they build substantial local facilities." Id. Section 271 relief will not only encourage AT&T, MCI, and Sprint to market bundled services to their long distance customers, but also will improve their ability to do so by lifting restrictions on joint marketing. 47 U.S.C. § 271(e)(1); see BellSouth Br. at 120-21.

C. There Would Be No Benefit from Expanding Congress's Test of Open Local Markets, if Such Action Were Permitted

Of course, these interLATA carriers would rather win business customers in the local markets they select than fight to retain their existing residential customers in Louisiana. Other CLECs likewise see opportunity in delaying BellSouth's interLATA relief, including the possibility of extracting concessions that could not be won in negotiations or arbitrations governed by sections 251 and 252.[52] Accordingly, these carriers seek to shift the focus of the inquiry to a claim that offers almost limitless possibilities for expansion and delay: that the

[52] Various parties such as ALTS claim that most CLECs have no stake in blocking Bell company interLATA entry. See, e.g., ALTS at 5. ALTS' assertion is particularly disingenuous given the war-cry aired at a recent ALTS convention: "We must delay as long as we possibly can the RBOCs' getting into long distance." Competitive LECs Urged to Wage Drive Against Bell Long Distance, Communications Daily, May 6, 1997 at 3 (quoting president-CEO, Intermedia Telecom Group).

"harm to local competition is both glaring and substantial if BellSouth enters long distance now." MCI at 100.

Such contentions suffer from two fatal flaws. First, and very simply, Congress forbade the Commission from re-writing its checklist with local competition requirements beyond the fourteen items negotiated by legislators. Second, even if Congress had left room for the Commission to adopt different standards, no party can point to any specific benefit from delaying BellSouth's interLATA entry once BellSouth has complied with the checklist; it is therefore impossible for the Commission to assess such supposed benefits or to find that they outweigh the concrete consumer gains from immediate interLATA entry by BellSouth.

1. The Benefits Sought By Opponents Are Unavailable Through the Section 271 Process

AT&T asserts that the competitive checklist is merely a set of "minimum terms that BOCs must provide" to CLECs, which may be augmented as necessary to protect against "anticompetitive effects." AT&T at 91. Yet section 271(d)(4) sets out perhaps the most unambiguous statement in the whole Act: "The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)." 47 U.S.C. § 271(d)(4). There is no exception to this limitation, not even for a consideration of the public interest.

As the Senate Commerce Committee's Chairman observed, "[t]he FCC's public-interest review is constrained by the statute" because "the FCC is specifically prohibited from limiting or extending the terms used in the competitive checklist." 141 Cong. Rec. S7967 (June 8, 1995)

(statement of Sen. Pressler). Because "agency discretion is defined by and circumscribed by law," the Commission's discretion could not under any circumstances "encompass the authority to contravene statutory commands." Farmworker Justice Fund, Inc. v. Brock, 811 F.2d 613, 622 (D.C. Cir.), vacated on other grounds, 817 F.2d 890 (D.C. Cir. 1987). This is true whether the Commission establishes additional "rigid requirements," AT&T at 91, or further local market "factors," Michigan Order ¶ 391. When determining whether an agency decision is arbitrary and capricious, courts consider "whether the decision was based on a consideration of the relevant factors . . . ." Citizens to Preserve Overton Park, Inc. v. Volpe, 401 U.S. 402, 416 (1971). Accordingly, "an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider . . . ." Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); see also Board of County Comm'rs v. Isaac, 18 F.3d 1492, 1497 (10th Cir. 1994) ("An agency acted arbitrarily and capriciously if it relied on factors deemed irrelevant by Congress . . . .").

These principles apply with particular force to substantive policies that are in conflict with the 1996 Act. For example, some CLECs advocate reintroduction of the Commission's invalidated "pick and choose" rule under the guise of the public interest test. See ALTS at 26-28; MCI at 82. This rule has been struck down as incompatible "with the Act's design to promote negotiated binding agreement." Iowa Utils. Bd., 120 F.3d at 801. It would not be any more harmonious with the congressional framework if imposed upon Bell companies through the public interest test.

Other CLECs seek to resurrect a metric test of local competition that Congress directly rejected. See, e.g., MCI at 97 ("Congress required local competition first, then long distance entry."); Sprint at 75 ("adequate competition" should be prerequisite for section 271 relief). Section 271(c)(1)(B) makes clear — and the Commission itself has confirmed, Oklahoma Order ¶ 55 — that competitors' entry into the local exchange is not a prerequisite to Bell company entry into in-region interLATA markets. Congress determined that while regulators should ensure symmetrical opportunities for local and long distance entry, entry tests that turn on measures of actual local competition would (if administrable at all) be contrary to the public interest. See Michigan Order ¶¶ 76-77.

Commenters who suggest that there would be benefits from enforcing extra-statutory requirements such as the "pick-and-choose" rule or a threshold test of local competition ask this Commission to undo a balance that Congress carefully calibrated. Congress decided after much debate that the competitive checklist would be its "test of when markets are open." 141 Cong. Rec. S8195 (daily ed. June 12, 1995) (statement of Sen. Pressler). While CLECs and DOJ — and even this Commission — may disagree with legislators' conclusions, in such a situation "the 'solution,' if there is to be one, lies with Congress." Independent Ins. Agents of Am. v. Ludwig, 997 F.2d 958, 961 (D.C. Cir. 1993). The Commission has no authority to upset Congress's legislative compromise.

2. There Would Be No Benefits from Delay

Even if their line of argument were supportable, commenters have utterly failed to show that local competition will be stronger in the future if BellSouth, having opened its markets by

satisfying the checklist, is denied the ability to offer interLATA services. On the contrary, the Louisiana PSC concluded that "[d]elaying BellSouth's entry into long distance until effective competition exists in local markets will only serve to delay the benefits of vigorous local competition." Louisiana PSC at 20.

AT&T and MCI seek to raise the specter of a BellSouth "monopoly over the provision of bundled packages consisting of BellSouth's local service and long distance service." AT&T at 85; see MCI at 100. This is ironic. Today, the ability to offer packages of local and interLATA services "is a formidable source of competitive advantage" for AT&T and MCI over BellSouth — which these carriers are actively exploiting in serving business customers. Gilbert Aff. ¶ 16; see id. ¶¶ 7-10. Section 271(e)(1) of the Communications Act, moreover, specifically guarantees AT&T, MCI, and Sprint the same easy entry into this area of competition (through local resale) that all other CLECs enjoy today. Nor could it be argued that bundling would not be practically available from BellSouth if the Commission relied simply on the checklist. Resale opportunities are a condition of interLATA authority under checklist item (xiv) and the other checklist items ensure competitors every facility and service Congress found necessary to enter the local market. 141 Cong. Rec. S8009 (daily ed. June 8, 1995) (statement of Sen. Hollings) (checklist is the test of "what actual and demonstrable competition would encompass"). As Professor Gilbert explained in BellSouth's Application, if customers take a bundled service package from BellSouth, "it will be because they prefer it." Id. ¶ 19; see also Hausman Reply Aff. ¶ 13.

ALTS and others suggest that BellSouth should not be permitted to augment long distance competition until every last issue regarding local interconnection and access has been

resolved. See, e.g., ALTS at 25-26. This approach — which would enable opponents to delay BellSouth's entry simply by asserting a grievance, without having to prove it — ignores that as the states and this Commission resolve new issues under the 1996 Act, those holdings will be binding upon BellSouth when it is competing in long distance. The fact that local competition issues will inevitably arise in the future cannot justify delaying the benefits of long distance competition.

Using a very different standard from those this Commission must use under section 271(d), DOJ suggests that local markets should be "fully and irreversibly ope[n]" before BellSouth is granted in-region, interLATA relief. DOJ at 1-2. Then, DOJ suggests that benefits from opening the BOCs' local markets to competition prior to allowing BOC interLATA entry may exceed the benefits to be gained from more rapid BOC participation in long distance markets. Id. at 34. Professor Hausman explains that DOJ's conclusion does not rest on an economic model, and, insofar as DOJ's expert discusses the work of Bell company witnesses, incorporates flawed assumptions and techniques. Hausman Reply Aff. ¶¶ 33-34. DOJ also appears to ignore the factual finding of the Louisiana PSC that local competition in Louisiana will increase due to approval of BellSouth's application.

Just as important, however, DOJ asks the wrong question. The issue before this Commission is not whether the benefits of opening BellSouth's local markets to competition justify retarding interLATA (as well as intraLATA toll, local, and manufacturing) competition. It is whether any additional benefit from regulating BellSouth's local markets in accordance with DOJ's vague standard — over and above the benefits already guaranteed by opening the markets

in accordance with Congress's checklist — outweighs the costs of delay. DOJ never attempts to address this issue, nor does its evaluation provide sufficient detail for the Commission (or any other party) to conduct the necessary analysis on DOJ's behalf.

No party in this proceeding can promise any additional local competition if new conditions for in-region, interLATA relief are stacked on top of the checklist requirements. CLECs may, for example, find serving Louisiana's residential customers unattractive without regard to the CLECs demands for concessions from BellSouth. BellSouth, however, can promise additional competition if this Application is granted. BellSouth believes that if this Commission wishes to serve the interests of consumers, the choice is clear.

VI. CLECs' MISCELLANEOUS ALLEGATIONS OF MISCONDUCT ARE UNFOUNDED AND IMMATERIAL

In its Michigan Order, the Commission declared that it would be "interested" in any evidence that "a BOC applicant has engaged in discriminatory or other anticompetitive conduct." Michigan Order ¶ 397. Predictably, CLECs have responded to this invitation with great enthusiasm, and have presented the Commission with a miscellany of supposedly "bad" behavior. These complaints have nothing to do with BellSouth's entry into interLATA services, or even BellSouth's opening of local markets. Instead, they are the last stand in a determined effort to keep BellSouth out of interLATA services.

Payphones. The Independent Payphone Service Providers for Consumer Choice ("IPSPCC") raise several allegations focusing on BellSouth Public Communications, Inc. ("BSPC"), an indirect subsidiary of BST. None of these allegations have any merit; indeed, it

appears that the IPSPCC is both mistaken as to the facts and unaware of Congress's mandate — and this Commission's efforts — to deregulate the payphone industry. See generally 47 U.S.C. § 276.

Contrary to the IPSPCC's contentions, neither BST nor BSPC has discriminated against IPSPCC members or undertaken any unjust or unreasonable marketing practice that violates sections 201(b) or 202(a) of the Act. The BellSouth materials attached to the IPSPCC's comments nowhere suggest BellSouth or BSPC sought to interfere with existing contracts between location providers and IPSPCC members by "suggest[ing] that the Commission's rules require customers to reevaluate their choice of long distance company." IPSPCC at 5. In fact, the opposite is true. The contractual materials cited by the IPSPCC, see id. at 5, clearly state that if the location provider has a contract with an entity other than BellSouth, that contract is to run its term unaffected. See id. Ex. A at 2, B.

Nor do BSPC's contracts or publicity materials "suggest that BellSouth has control" over any interexchange carrier. IPSPCC at 5. The materials filed by IPSPCC explicitly indicate that the location provider has no existing contract and is simply designating BSPC as its agent for the purpose of selecting the primary interexchange carrier. See Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996, 11 FCC Rcd 20541, 20662, ¶ 243 (1996) ("Payphone Order") (noting that section 276 granted Bell company payphone service providers "the right to participate as a contractual intermediary between a location provider and a third-party interLATA carrier"). The BSPC

contracts and publicity materials comport with both the spirit and the letter of the Payphone Order.

The IPSPCC's claims regarding lawful fees BSPC charges to certain location providers are addressed in BellSouth's Application. BellSouth Br. at 114 & n.86. IPSPCC also alleges that BSPC has engaged in "slamming" — the unauthorized changing of a payphone's primary interexchange carrier. BellSouth has investigated all of IPSPCC's allegations to the best of its abilities, and found no evidence of slamming.

The IPSPCC also contends that BSPC "has a financial relationship with TelTrust that violates the prohibition against BOC provision of in-region interLATA service." IPSPCC at 12. This is simply wrong. Consistent with section 276 of the Act, BSPC has negotiated a standard agreement with TelTrust under which BSPC will receive commissions based on the amount of traffic BSPC has aggregated. See 47 U.S.C. § 276(b)(1)(D).

BSPC has fully investigated the allegations listed in Appendix D to the IPSPCC's comments, regarding three-way calls between BSPC, location providers, and interexchange carriers. In every instance, the actions taken by BellSouth's representatives fully comport with the requirements of section 276 and this Commission's payphone orders. Shinholster Aff. ¶ 7.

Marketing Practices. MCI claims that BellSouth, upon receiving transfer orders from MCI for certain local customers, has improperly sent "retention letters" urging these customers to cancel their orders. See MCI at 84. Contrary to MCI's allegation, the purpose of these letters was to ensure that customers were not victims of slamming and had in fact decided to transfer. See Varner Aff. ¶ 234. Furthermore, to address CLECs' concerns, BellSouth has altered the

substance of these letters and only sends letters to customers after they have already been transferred to their new carrier. See id. ¶ 235.

ACSI accuses BellSouth of attempting to "lock-out" CLECs by entering into Property Management Services Agreements and exclusive marketing arrangements with sales agents. ACSI at 52-53. These agreements merely provide that property managers and sales agents will recommend BellSouth as the provider of choice in a given building. They do not exclude CLECs from providing service in a building, nor do they restrict tenants from obtaining service from BellSouth's competitors. ACSI and any other CLEC can enter into similar agreements. In fact, BellSouth's agreements contain a termination clause that permits either party, if dissatisfied with the alliance, to cancel the contract upon 30 days written notice. Varner Reply Aff. ¶¶ 6-7.

ACSI alleges that in September 1997, it lost a local Mississippi government contract because BellSouth made "false and disparaging" comments about ACSI and defamatory comments about ACSI's employees. See ACSI at 51. BellSouth employees are specifically instructed concerning how products and services are to be offered in compliance with the Act. Agerton Aff. ¶ 15. In addition, to prevent incidents of the sort alleged by ACSI, each BellSouth employee receives a letter from the officer of his or her organization warning that no BellSouth employee may "say, write or otherwise do anything to disparage" BellSouth's competitors. Id. ¶ 6.

Finally, AT&T notes proceedings before the Florida, Kentucky, and Georgia commissions concerning intraLATA toll marketing practices. See AT&T at 90. BellSouth has

revised its policies where necessary to comply with the state commissions' orders. It is not disputed that intraLATA toll competition has flourished in these States.

ACTL Moves. ACSI further attacks BellSouth's imposition of reconfiguration nonrecurring charges ("RNRCs") on access channel termination location ("ACTL") moves. ACSI at 53-54. ACSI's argument — which ACSI has also made in a formal complaint that is separately pending before the Commission[53] — is that BellSouth's RNRCs exceed costs and are applied unevenly, and therefore deter interexchange carriers from switching direct trunked access purchases from BellSouth to a competing provider. As BellSouth has demonstrated in its answer to ACSI's complaint and in its subsequent briefs, ACSI's argument is without merit.[54] ACSI has grossly exaggerated BellSouth's charges for ACTL moves and has offered no meaningful evidence that controverts BellSouth's detailed cost studies. ACSI's only basis for claiming that BellSouth applies RNRCs unevenly is that BellSouth has waived such charges on non-ACTL moves. ACSI argues that all reconfigurations should be subject to the same charges. But the Commission itself has recognized otherwise — that ACTL moves do warrant "different and generally higher reconfiguration charge[s]" than other types of reconfigurations.[55]

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[53] American Communications Servs., Inc. v. BellSouth Telecommunications, Inc., No. E-96-20 (FCC).

[54] See BellSouth's Answer, No. E-96-20 (FCC filed April 8, 1997); Respondent's Reply Brief, No. E-96-20 (FCC filed May 27, 1997).

[55] Expanded Interconnection with Local Telephone Company Facilities, 8 FCC Rcd 7341, 7359 (1993).

State Regulatory Proceedings. Cox accuses BellSouth of delaying, through a "purely procedural, mertiless objection," Cox's application for a certificate of public convenience and necessity with the Louisiana PSC. In fact, BellSouth recommended to the Louisiana PSC that Cox's application be approved. Cox admits that "BellSouth had no objection to Cox being certified as a CLEC." Cox at 13-14. The reason BellSouth intervened was because Cox's application was not, contrary to Cox's suggestion, "routine." Cox's application instead sought an exemption from the Louisiana PSC's unbundling rules, which raised general issues regarding interpretation of these rules with implications far beyond Cox itself. In order not to delay Cox from being certified, BellSouth proposed to the Louisiana PSC that Cox be granted temporary approval so that Cox's exemption request could be considered separately. The Louisiana PSC approved Cox's application only six weeks after BellSouth intervened, and just twelve weeks from the date of Cox's filing.

Extended Area Service. BellSouth's Area Plus service is an optional expanded local calling service that offers unlimited calling within a customer's LATA for a fixed price. AT&T suggests that BellSouth has used this service to block intraLATA toll competition. AT&T at 89-90. AT&T also accuses BellSouth of having entered into a "secret" plan with independent LECs by which BellSouth and these LECs would compensate each other for the interchange of traffic at lower rates than the rates interexchange carriers paid under a subsequent industry agreement. See AT&T at 89.

While AT&T complains that EAS plans are inherently discriminatory, they have consistently been upheld by state commissions. Varner Aff. ¶ 12. Moreover, CLECs are not precluded from offering this same expanded service. Id.

There was nothing "secret" about BellSouth's Area Calling Plan ("ACP") agreement. This agreement was reached by LECs serving South Carolina after negotiations that were started in 1989 — well in advance of intraLATA competition in South Carolina. Varner Reply Aff. ¶ 1. At the direction of the South Carolina PSC, the agreement established principles for managing requests for additional Extended Area Service ("EAS") in South Carolina, as well as billing arrangements between companies offering EAS plans. Id. ¶ 11. The agreement was unrelated to the introduction of intraLATA toll competition, as the South Carolina PSC has stated. Id. ¶ 12. Although not obligated to do so, BellSouth has offered the terms of its ACP agreement to all interexchange carriers offering EAS plans. In April of 1994, AT&T accepted these terms in a stipulation that was filed in South Carolina with the South Carolina PSC. Id. ¶ 13.

CONCLUSION

Congress established a blueprint for simultaneously opening local and long distance markets. This Commission should return to that plan. BellSouth has done everything required to open the local market in Louisiana, as the Louisiana PSC has verified. Further delay in opening interLATA markets will cause consumers direct harm, with no offsetting benefit of any kind. The Application should be granted.

Respectfully submitted,

MICHAEL K. KELLOGG
AUSTIN C. SCHLICK
KEVIN J. CAMERON
JONATHAN T. MOLOT
WILLIAM B. PETERSEN
KELLOGG, HUBER, HANSEN,
TODD & EVANS, P.L.L.C.
1301 K Street, N.W.
Suite 1000 West
Washington DC 20005
(202) 326-7900
Counsel for BellSouth Corporation, BellSouth Telecommunications, Inc. and BellSouth Long Distance, Inc.

WALTER H. ALFORD
WILLIAM B. BARFIELD
JIM O. LLEWELLYN
1155 Peachtree Street, N.E.
Atlanta, GA 30367
(404) 249-2051
DAVID G. FROLIO
1133 21st Street, N.W.
Washington, DC 20036
(202) 463-4182
GARY M. EPSTEIN
LATHAM & WATKINS
1001 Pennsylvania Ave., N.W.
Washington, DC 20004
(202) 637-2249
Counsel for BellSouth Corporation

JAMES G. HARRALSON
28 Perimeter Center East
Atlanta, GA 30346
(770) 352-3116
Counsel for BellSouth Long Distance, Inc.

MARGARET H. GREENE
R. DOUGLAS LACKEY
MICHAEL A. TANNER
STEPHEN M. KLIMACEK
675 W. Peachtree Street, N.E.
Suite 4300
Atlanta, GA 30375
(404) 335-0764
Counsel for BellSouth Telecommunications, Inc.

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